Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

HERAND ABCARIAN, M.D., F.A.C.S.,
Petitioner,

v.

TIMOTHY MCDONALD, M.D., J.D., PATRICIA KALE, WILLIAM H. CHAMBERLIN, JR., M.D., NIKKI CENTOMANI, STUART ALLEN, BARBARA MCCOLGIN, CHRIS J. MOLLET, ESQ., THOMAS R. BEARROWS, ESQ., CHRISTINE FLANIGAM,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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January 11, 2011

QUESTIONS PRESENTED

1. Whether *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), can be extended beyond the public employer context to preclude class-of-one equal protection claims of a government employee against his co-employees acting outside the scope of their agency.

2. Whether *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), bars a government employee from bringing a First Amendment retaliation claim against his co-employees for actions outside the scope of their authority.

3. Whether the court should address the "important ramifications for academic freedom" noted but not ruled upon in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

4. Whether a plaintiff should be allowed to amend his complaint when, due to the plausibility pleading standard articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), a district court considers matters outside the record in its decision to dismiss the complaint and where the plaintiff can plead additional facts to state a claim for relief that is plausible on its face.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review judgment of the United States Court of Appeals for the Seventh Circuit in *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, 617 F.3d 931 (7th Cir. 2010), is reprinted at Appendix C. The Denial of Rehearing is reprinted at Appendix A. The Denial of Rehearing is unpublished. The Memorandum Opinion for the United States District Court for the Northern District of Illinois, on motion for reconsideration and leave to amend, dated August 10, 2009, 2009 WL 2448044 (N.D.Ill. 2009), is reprinted at Appendix E. The initial Memorandum Opinion for the United States District Court for the Northern District of Illinois, dated March 9, 2009, 2009 WL 596575 is reprinted at Appendix H. The district court opinions currently are unpublished.

STATEMENT OF JURISDICTION

On August 13, 2010, the court of appeals affirmed the district court's dismissal of the amended complaint and the case and its denial of reconsideration and leave to file the Proposed Second Amended Complaint. On October 13, 2010, the court of appeals denied the petition for rehearing and rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Free Speech Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves a 42 U.S.C. § 1983 claim filed by world-renown surgeon and medical professor, Herand Abcarian M.D., F.A.C.S. ("Petitioner") against several of his co-employees ("Respondents") at the University of Illinois Medical Center and College of Medicine in Chicago for retaliation against him for his First Amendment free speech, and for treating him differently than other physicians as a result of personal animus.

Petitioner filed a complaint in the United States District Court for the Northern District of Illinois. After Respondents moved to dismiss, the district court allowed Petitioner leave to file his First Amended Complaint without ruling on the merits. The district court then granted Respondents' motion to dismiss the First Amended Complaint and denied Petitioner's motion to alter or amend the judgment pursuant to Fed. Rules Civ. Pro., Rule 59(e) and for leave to file Proposed Second Amended Complaint pursuant to Fed. Rules Civ. Pro., Rule 15. Petitioner

appealed this dismissal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed and denied rehearing and rehearing en banc. This petition for writ of certiorari was timely filed.

Initially it is to be noted that this case does not involve any action taken against Petitioner by his *employer*. The Respondents in this case had no supervisory position or disciplinary powers over Petitioner; they could not fire him, reduce his pay, or initiate any other employer disciplinary action against him. Instead, it concerns actions by fellow *co-employees* who conspired to dishonor and damage Petitioner professionally in the only way they could - by falsely reporting to governmental license and reporting agencies the non-existent settlement of a medical malpractice case against him. [1]

In this case, Respondents settled on behalf of the Board of Trustees of the University of Illinois a medical malpractice suit which they conspired to have filed for the Estate of John H. Bezhad against Petitioner. Concurrent with the settlement by the Board of Trustees, Respondents instructed the claimant's attorney to file suit against Petitioner but not to serve him with process.[2] Respondents then falsely reported the settlement of the lawsuit by the Board of Trustees as a settlement made on behalf of

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[1] The facts of the underlying case are summarized at Appendix J, pp. 75a-76a.

[2] Petitioner only discovered this lawsuit when the medical licensing and reporting agencies began an investigation of Petitioner's fitness to practice medicine.

Petitioner to the medical licensing and reporting agencies. Respondents, however, did not have authority to make any such reports, particularly not false reports, nor had these employees nor the Board of Trustees ever reported even a single physician to the licensing and reporting authorities, other than Petitioner. Furthermore, this report was entirely false as Petitioner was not a party to the settlement and the lawsuit was a sham.[3]

These actions were motivated by Respondents' personal animus against Petitioner for speaking out as a citizen about various issues involving the Respondents including: opposition to the waste of public funds to build an office suite for two Respondents, opinions that physicians (including one of the Respondents) with substance abuse problems should lose clinical privileges, and opposition to issues regarding allocation of compensation and fringe benefits as well as increased medical malpractice premiums. As Petitioner made clear in his Proposed Second Amended Complaint, which he was denied leave to plead, the Statutes of the University of Illinois provided that as a tenured professor, he could not be disciplined by anyone for his expressions of free speech nor could he be disciplined for any other reason except by the President of the University with the concurrence of the Board of Trustees. Thus, in retaliating against Petitioner for his speech, Respondents were acting

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[3] Contrary to the footnote in the Seventh Circuit's opinion below, the Illinois Appellate Court found: "defendant was not a party to the settlement agreement." Bezhad v. Abcarian, No.1-07-1357, slip op. (Ill. App. 1st Dist. May 19, 2008) Appendix I, p. 71a.

outside the scope of their authority. They were not Petitioner's employer and had no authority to discipline him.

Furthermore, as a member of the academic staff, the Statutes specifically provided for "full freedom within the law of inquiry, discourse . . . and to protect any member of the academic staff against influences, from within or without the University, which would restrict the member's exercise of these freedoms in the member's area of scholarly interest." Moreover, this Statute specifically provided: "As a citizen, a faculty member may exercise the same freedoms as other citizens without institutional censorship or discipline."

REASONS TO GRANT THE PETITION

Petitioner in this case was part of the public sector workforce as Chief of Surgery and a tenured professor of medicine at a public university medical center and college of medicine. The Bureau of Labor Statistics reported that as of December 2008, there were 21,114,528 public employees. In that year, 139,877,000 people were employed in the United States.[4] Any decision about public employees, therefore, has an enormous impact since 15 percent of employed people in the United States worked in the public sector in 2008 and the public sector workforce continues to grow in size and percentage of employed persons. This Court should grant this

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[4] Bureau of Labor Statistics, Labor Force Statistics, Table A-1. Employment Status of the civilian population by sex and age, www.bls.gov/webapps/legacy/cpsatab1.htm (last visited January 4, 2010).

petition to determine how *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), apply outside the public employer context when government workforce co-employees exceed the scope of their authority. Additionally, it is important to determine the issue presented of free speech in an academic setting. Furthermore, given the new pleading standard articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), this Court should determine when plaintiffs should be allowed to amend their complaint to refute a district court's speculation of their job duties.

I. This petition should be granted to determine whether *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146 (2008), can be applied to class-of-one equal protection claims outside of the public employer context.

When a plaintiff alleges that she has been intentionally treated differently from other similarly situated individuals and that there is no rational basis for the different treatment, a class-of-one equal protection claim may be brought. *City of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000). Such a theory, however, does not apply to government employees for disciplinary or job-related decisions against him by his employer. *Engquist*, 553 U.S. at 606, 128 S.Ct. at 2156. While this Court limited its holding to claims of a government employee against his government employer, circuits in the United States Court of Appeals have expanded this

reasoning to bar class-of-one claims involving other inherently subjective, discretionary governmental decisions. *See, e.g., Flowers v. City of Minneapolis*, 558 F.3d 794, 799-800 (8th Cir. 2009) (class-of-one claims do not apply to police officers for their discretionary investigative decisions); *see also Douglas Asphalt Co. v. Qobe Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2009) (class-of-one claims do not apply to government contractors); *United States v. Moore*, 543 F.3d 891, 900-01 (7th Cir. 2008) (class-of-one claims do not apply in criminal sentencing decisions); *but see Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 142 (2d Cir. 2010) (refusing to extend *Engquist* to bar a class-of-one claim against a government agency for increased scrutiny against a laboratory). This Court, however, should determine when, if at all, *Engquist* can be expanded.

In *Engquist*, this Court determined that class-of-one equal protection claims do not apply to a public employee against his employer. 553 U.S. at 606, 128 S.Ct. at 2156. This Court noted the distinction between the government regulating and the government managing its internal operation. *Id.* at 598, 128 S.Ct. at 2151. It acknowledged that the government has broader power as an employer than as a sovereign. *Id.* Thus, the class-of-one theory, which purports that similarly situated people treated differently are entitled to at least a rational reason for the difference, is a poor fit for the employment context. *Id.* at 601, 128 S.Ct. at 2153. When a government employer treats a public employee differently, it is only exercising broad discretion that is within the nature of any action in the employment context. *Id.* at 605, 128 S.Ct. at 2155.

To further explain its point, this Court, in dicta, stated:

> "There are some forms of state action, however, which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* at 603, 128 S.Ct. at 2154.

Furthermore, this Court gave an example that it would be improper to challenge a police officer's decision to ticket a particular speeder when he let other speeders go because the "nature is a subjective, individualized decision." *Id.*, 128 S.Ct. at 2154.

In response to this dictum, lower courts have expanded the holding in *Engquist*, despite the statement that it was limited to claims against public employers acting as employers. The Seventh Circuit in this case stated that it had "interpreted *Engquist* to stand for the broad proposition that inherently subjective discretionary governmental decisions may be immune from class-of-one claims." *Abcarian v. McDonald*, 617, F.3d 931, 939 (7th Cir. 2010); *see also United States v. Moore*, 543 F.3d at

900-01 (applying *Engquist* to sentencing decisions in criminal cases); *but see Hanes v. Zurick*, 578 F.3d 491, 495-96 (7th Cir. 2009) (finding that the class-of-one theory can apply to a police officer who repeatedly arrested the plaintiff without probable cause). Other circuits also have expanded this holding to other discretionary governmental action. *Flowers*, 558 F.3d at 799-800 (holding that *Engquist* bars class-of-one claims involving a police officer's investigative decision); *Douglas Asphalt Co.*, 541 F.3d at 1274 (finding *Engquist* bars class-of-one claims of government contractors).

The Second Circuit, however, refused to extend *Engquist* outside the employer context. *Analytical Diagnostic Labs*, 626 F.3d at 142. The court reasoned that *Engquist* was decided based on three reasons. *Id.* First, because employment decisions are subjective and individualized, and rely on factors that are difficult to articulate and quantify, they are unsuited for the class-of-one theory. *Id.* Furthermore, the government is given wider latitude as an employer than as a regulator. *Id.* Finally, this Court did not want to make a constitutional claim out of every employment dispute. *Id.* The Second Circuit found, however, that this decision does not bar class-of-one claims of *all* discretionary government actions. *Id.* Therefore, in the context of its case, where a government agency subjected a laboratory to more rigorous scrutiny, a class-of-one claim was available. *Id.* However, the Second Circuit did not rule out an expansion of *Engquist* in some circumstances. *Id.*

The trend, therefore, is clear. Lower courts are expanding the *Engquist* holding beyond the

employment context. *See* Robert C. Farrell, *The Equal Protection Class of One Claim: Olech, Engquist, and the Supreme Court's Misadventure*, 61 S.C. L. Rev. 107 (2009). This Court should grant this petition to determine to what extent, if any, *Engquist* can be extended beyond employer decisions.

Since the lower courts are expanding the holding of *Engquist* despite an explicit statement that the decision is limited to class-of-one cases in the employment context, they are not acting properly. These lower courts are using court dicta to trump the holding of a case; a method that is not good jurisprudence. Darien Shanske, *Engquist and the Erosion of the Equal Protection Clause: An Attempt to Stop the Creep of Irrational Dicta*, 61 Hastings L. J. 969, 982 (2010). This Court is the only authority that should expand its holdings.

Also, there are many other considerations involved in expanding *Engquist* that this Court did not take into account when it decided the case on narrow grounds. For example, any decision that bars class-of-one claims implicates the issue of immunity; it can turn areas of qualified immunity into absolute immunity – an act that should be done with caution by this Court. *Id.* at 983. Moreover, this Court should decide which standard governs whether a class-of-one claim is barred – not the lower courts. *Id.* Additionally, if this Court were to decide on the discretion standard employed by some of the lower courts, it would have to harmonize the standard with other areas that determine whether a

government function is discretionary.[5] Utilizing this standard in class-of-one equal protection cases would add more litigation to the area; this Court should decide whether this is necessary.

This case presents a different issue than in *Engquist*. Here, Respondents were *not* government employers. Rather, they were fellow citizen employees acting outside their job duties and not carrying out their employer's policies. As employees, therefore, they do not need more leeway to manage internal operations. Furthermore, it was not an action where they had no discretion but instead their actions were entirely illegitimate, malicious and false. Accordingly, the co-employees were not acting as agents of their employers, just as police officers who use excessive force on arrestees are not acting in furtherance of their employer's policies and are acting outside of the protection of the law. Co-employees should not receive the same leeway as those with employer supervisory responsibility to manage the internal operations of a government function since they are not in charge of managing any aspect of the workplace at all.

This Court, therefore, should grant this petition to determine whether *Engquist* can be expanded to bar class-of-one claims of a government employee against co-employees acting outside of their job duties and to determine whether *Engquist* should be expanded at all.

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[5] This Court has utilized the discretionary function distinction in municipal tort liability under state law, federal due process cases, and federal tort liability under the Federal Tort Claims Act. See: Shanske, 61 Hastings L. J. at 984.

II. This petition should be granted to determine whether *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), bars First Amendment retaliation claims of a government employee against his co-employees acting outside the scope of their employment.

This Court has consistently treated constitutional review of issues with the public sector workforce as a distinct class of cases. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 1885 (1994) (plurality opinion) ("government as an employer indeed has far broader powers than does the government as a sovereign"). Thus, in the free speech context, this Court has held that the First Amendment does not apply to statements of a public employee made pursuant to his job responsibilities and duties. *Garcetti v. Ceballos*, 547 U.S 410, 421, 126 S. Ct. 1951, 1959 (2006). The Seventh Circuit, in turn, has read the *Garcetti* opinion broadly; it applies to *all* public employees speaking pursuant to their official duties. *Speigla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007). The Seventh Circuit reasons that *Garcetti*, therefore, also extends to co-employees whose actions advance the employer's interest in maintaining an orderly workplace. *Fairley v. Andrews*, 578 F.3d 518, 524 (7th Cir. 2009). The Seventh Circuit in this case, however, refused to decide whether *Garcetti* broadly applies to all instances of co-employee retaliation. *Abcarian*, 617 F.3d at 937. Due to the enormous number of people affected by decisions about the public sector workforce, this Court should grant this petition to determine this issue.

Garcetti was decided based on the premise that government employers must be given discretion to manage their operations. 547 U.S. at 422, 126 S.Ct. at 1960. The rule is meant to promote workplace order, tranquility, and efficiency. *See id.*, 126 S.Ct. at 1960. Government employers, just like employers in privately owned business, must be able to discipline their employees whose actions are detrimental to the functioning of the employer or agency. However, applying the *Garcetti* rule to *everything* in the public employment context, rather than just instances of job discipline involving an *employer*'s action against an employee acting contrary to the employer's directions or interests, has an adverse effect.

In an age where corruption is rampant, such a rule chills government employees from blowing the whistle on other employees. *See* Howard Kline, *Garcetti v. Ceballos: The Cost of Silencing Public Employees*, 28 L. J & Com. 75 (2009). If a public employee blows the whistle on a co-employee for fraud or corruption in the workplace, the speech is most frequently within his job duties, and therefore not protected by the First Amendment under the *Garcetti* rationale despite being a matter of high public concern. *Id.* at 83. Thus, co-employees will have free reign to retaliate against their colleagues for reporting them; this gives employees little incentive to alert the proper authorities of fraud or other wrongdoing. *Garcetti*, therefore, should not apply when co-employees are involved.

Furthermore, allowing such retaliation on the part of co-employees is contrary to the principles set forth in *Garcetti* and will result in workplace chaos.

Co-employees will conspire against their fellow employees, such as here, creating a tense, cut-throat work environment where no one can be productive. Accordingly, the holding in *Garcetti* should be interpreted to allow the First Amendment to apply in this and similar situations. This Court should grant this petition to decide this issue and to protect millions of Americans who work in the public sector.

III. This petition should be granted to determine the "important ramifications for academic freedom" associated with control of free speech in an academic setting noted but not ruled upon in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

This case arises not just in a government agency but in a public university hospital and medical school. In *Garcetti*, the majority noted that "expressions related to academic scholarship or classroom instruction implicate additional constitutional interests that may not be fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti*, 547 U.S. at 425, 126 S.Ct. at 1962. In his dissent, Justice SOUTER, joined by Justices STEVENS and GINSBURG, said, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" *Garcetti*, 547 U.S. at 438, 126 S.Ct. at 1969.

In addition to its very significant impact on the public sector workforce, this case also implicates

academic freedom. Petitioner was a professor at a public university hospital and medical school. It was explicit, written academic policy that Petitioner could speak freely on all matters and not be disciplined for anything he said.[6] However, even though his employer could not discipline him, co-employee Respondents retaliated against him for his speech. Allowing co-employees in the academic field to utilize such tactics with impunity under the aegis of workplace discipline will have a detrimental effect on academic expression. The Seventh Circuit gave short shrift to this concern, footnoting that Petitioner's "speech involved administrative policies that were much more prosaic than would be covered by principles of academic freedom," even though Petitioner's specific speech was not quoted in the pleadings. Appendix C, p. 15a.

In order to define the parameters of "academic speech" and to protect academic freedom, this Court should grant this petition to decide the issue of how the *Garcetti* rule applies to speech in connection with academic freedom, activities, scholarship and classroom instruction. As this Court noted, academic speech may raise additional interests not accounted for by *Garcetti*, and this issue should be decided to eliminate improper and undesirable chilling of academic expression. *See Garcetti*, 547 U.S. at 425, 126 S.Ct. at 1962.

IV. This petition should be granted to determine whether a plaintiff should be allowed to

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[6] Petitioner attempted to plead these facts in his Proposed Second Amended Complaint, which the district court denied leave to plead. Appendix J, pp. 81a-84a.

> amend his complaint after a district court, pursuant to the pleading standard established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) dismissed the complaint and where the plaintiff can plead the relevant facts needed to state a claim for relief that is plausible on its face.

Prior to *Bell Atlantic* and *Iqbal*, interpretation of the Federal Rules of Civil Procedure was premised on the idea that all parties and claims should be treated equally, the ends of justice should be promoted rather than sacrificed to technical decision making, and the legal rights of citizens should be enforced so that they have access to the courts. Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L. J. 1, 4-6 (2010). However, *Twombly* and *Iqbal* are the latest in a trend to end cases early in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. *Id.* at 10-16.

Since *Iqbal*, lower courts have struggled with the issue of how to draw the fact-conclusion distinction. *Id.* at 22. This is a particularly difficult distinction to draw when the issue is whether or not an employee is acting within the scope of his employment. This court has held that job descriptions "bear little resemblance to the duties an employee is actually expected to perform." *Garcetti*, 547 U.S. at 425. Despite the fact that Federal pleadings are notice pleadings, the courts are transforming arguably factual allegations into legal conclusions so as to disallow the claim. *See, e.g.*,

Maldonado v. Fontanes, 568 F.2d 263 (1st Cir. 2009) (characterizing some allegations as "conclusory" before determining whether the remaining facts stated a claim); *Knaus v. Town of Ledgeview*, 2010 WL 2640272 (E.D. Wis. June 24, 2010) (calling allegations "conclusory"); *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217, 222 (D.P.R. 2009) (calling allegations "generic" and "conclusory"). Furthermore, the ruling on a motion to dismiss now turns on pre-judicial life experiences or on individual ideology regarding the claims being advanced or upon personal attitudes of the district court rather than the well-pleaded allegations of the complaint; complaints are no longer being viewed in the light most favorable to the plaintiff. Arthur Miller, 60 Duke L. J. at 28. Essentially, lower courts have transformed the motion to dismiss into a motion for summary judgment. *See id.* Petitioner made that very argument to the district court in his unsuccessful motion for reconsideration under Fed. Rules Civ. Pro 59 (e) and for leave to file his Proposed Second Amended Complaint under Fed. Rules Civ. Pro 15. In response, the district court retorted that "the district court did what it is supposed to do by basing its opinion on a through review of all the allegations in Abcarian's 48-page amended complaint." Appendix E, pp. 35a-36a. But it did not actually do that since Petitioner had specifically pleaded that his speech was made as a citizen in the exercise of his rights to free speech on matters of public concern under the First Amendment. Petitioner did not enumerate his job duties in his amended complaint. The district court speculated as to Petitioner's job duties based upon his position in the university. The district court ignored Petitioner's factual allegations of free speech

as being a mere conclusion and found that his speech was made as part of his official duties. Appendix H, p. 56a. Thus the district court's plausibility determination was apparently made upon its speculation, based upon his official titles. Appendix H, p. 57a. Unfortunately, as here, in motions to dismiss, unlike summary judgment, plaintiffs are not allowed to provide additional facts, and trial judges are speculating on facts outside the four corners of the complaint to dismiss cases. Miller, 60 Duke L. J. at 28.

In this case, the district court, in attempting to determine if Petitioner's complaint passed the plausibility standard, speculated on Petitioner's job responsibilities and therefore erroneously determined that Petitioner was speaking as part of his official duties, even though he pleaded that his speech was as a private citizen. If Petitioner had been granted the opportunity to file his Proposed Second Amended Complaint,[7] that pleading would have set forth the University Statutes granting him unrestricted free speech and freedom from discipline for such speech, thereby eviscerating any basis for the district court to find that speech was part of his job and thus subject to discipline pursuant to *Garcetti*. Appendix J pp. 81a-84a. Such allegations concerning the Statutes of the University guaranteeing that Petitioner could not be disciplined for free speech were not relevant until the district

[7] The Proposed Second Amended Complaint abandoned the claim against the Board of Trustees of the University of Illinois, a claim premised upon ratification by the Board of the misconduct by the co-employees and joinder in the conspiracy against Abcarian. Appendix J. It also alleged that his speech was not part of his official duties. Appendix J, p. 76a.

court made them so when it ignored his allegation that he was speaking as a private citizen and dismissed Petitioner's complaint. But it then also foreclosed him from filing his Proposed Second Amended Complaint which would have established that his job did not include speech and he could not be disciplined for anything he said. Appendix J, pp. 81a-84a. The Seventh Circuit then compounded this injustice by faulting Petitioner for not making factual allegations which would have been contrary to the district court's speculation about his job duties, allegations he was prohibited from pleading. Appendix C, p. 15a.

While this Court may continue to impose a plausibility pleading standard in Civil Rights cases, it should temper such standard with a caution to the courts below to liberally allow amendment to the pleadings in order to correct misapprehension by the district courts of facts such as job duties. It is common sense to recognize that there is not a level playing field in the area of Civil Rights cases, cases which are fundamental to our basic principles of constitutional government. The state and municipal defendants in such cases are often repeated defendants, ably represented by cadres of litigators with considerable accumulated experience in such litigation. Plaintiffs, on the other hand, are frequently represented by yeoman trial lawyers whose ordinary stock in trade is wrongdoing of all descriptions, without special expertise in Civil Rights cases. Add to this the fact that there is an enormous body of case law in the field of Civil Rights that requires considerable scholarship to master. Thus, the job of plaintiff's counsel is one where the district courts should exercise some understanding

and accommodation. Liberal amendment of pleadings should be allowed in such cases to substitute parties and change theories as the pleadings are honed to present a triable case. This Court, therefore, should grant this petition to determine whether plaintiffs should be allowed to amend their complaints after the court rules on motions to dismiss based on what the court conjectures to be relevant, in order to avoid unpredictability and speculation in the lower courts.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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